

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

In re:)
)
USA COMMERCIAL MORTGAGE)
COMPANY, et al.,)
)
Debtors.)
_____)
BINGHAM McCUTCHEN LLP,)
)
Defendant-Appellant,)
)
v.)
)
USACM LIQUIDATING TRUST,)
)
Plaintiff-Appellee.)
_____)

Chapter 11 Case No. BK-S-06-10725-LBR

Jointly Administered

Adversary No. 08-01131-lbr

Case No. 2:09-cv-01608-RLH-LRL

Ref. No. 09-CV-32

OPINION

Appeal from the United States Bankruptcy Court
for the District of Nevada
Honorable Linda B. Riegle, Bankruptcy Judge, Presiding

Submitted March 11, 2010
Las Vegas, Nevada

Filed June 3, 2010

Opinion by Chief Judge Roger L. Hunt

1 HUNT, Chief Judge.

2 In this appeal, the Court considers whether the bankruptcy court erred when it
3 granted USACM Liquidating Trust's (the "Trust") motion for summary judgment. The bankruptcy
4 court concluded that USA Commercial Mortgage's ("USACM") wire transfer of \$200,000 to
5 Defendant, law firm Bingham McCutchen ("Bingham"), was a fraudulent and thus avoidable
6 transfer under 11 U.S.C. § 548. The Court affirms the bankruptcy court's order.

7 **I. BACKGROUND**

8 In its capacity as a mortgage lender, USACM originated and serviced several loans
9 for the development of a real estate project in Los Angeles known as Marlton Square. The
10 developers for the Marlton Square project included three entities controlled by Christopher
11 Hammond: Capital Vision Equities ("CVE"), MS Acquisition, and Marlton Square Associates.
12 Bingham provided legal counsel to CVE for Marlton Square and other projects.

13 In November 2005, CVE sent Bingham a check for \$250,000 for outstanding
14 amounts due to Bingham, which was returned for insufficient funds. CVE sent a second check to
15 Bingham for \$225,000 in December 2005, which was also returned for insufficient funds on
16 January 9, 2006. The next day, January 10, USACM wired \$200,000 to Bingham. USACM
17 recorded the transfer as an advance to the Marlton Square project and classified it as an account
18 receivable on USACM's books. No party presented to the Court additional documentation or
19 written records in relation to the wire transfer. Bingham had no direct business relationship to
20 USACM prior to or following the transfer. At the time of the wire transfer, MS Acquisition was
21 past due on interest payments of \$964,434 from previous loans USACM made to it.

22 USACM filed a petition for Chapter 11 bankruptcy on April 13, 2006, and the
23 liquidating Trust was formed to manage its assets. The Trust brought suit in bankruptcy court to
24 recover the \$200,000 transferred to Bingham in January 2006. Title 11 U.S.C. § 548 provides that
25 bankruptcy trustees may avoid constructively fraudulent transfers. The Trust claims that under 11
26 U.S.C. § 548 (a)(1)(B)(i), USACM received less than a reasonably equivalent value in exchange

1 for its transfer to Bingham. The bankruptcy court found that the transfer was avoidable and granted
 2 summary judgment in favor of the Trust. The bankruptcy court concluded that USACM had not
 3 received any kind of promise to pay in return for the \$200,000 and that the transfer was not made
 4 for reasonably equivalent value. Bingham appeals.

5 **II. JURISDICTION AND STANDARDS OF REVIEW**

6 The Court has appellate jurisdiction pursuant to 28 U.S.C. § 158(a). A bankruptcy
 7 court's conclusions of law are subject to de novo review, as are its grants of summary judgment. *In*
 8 *re Bialac*, 712 F.2d 426, 429 (9th Cir. 1983); *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008). In
 9 considering the Trust's motion for summary judgment de novo, the Court "must determine,
 10 viewing the evidence in the light most favorable to the nonmoving party, whether there are any
 11 genuine issues of material fact and whether the [bankruptcy] court correctly applied the relevant
 12 substantive law." *See McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008) (internal
 13 quotation marks and citations omitted).

14 Summary judgment is proper when "the pleadings, the discovery and disclosure
 15 materials on file, and any affidavits show that there is no genuine issue as to any material fact and
 16 that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is
 17 "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find
 18 for the non-moving party, and a dispute is "material" only if it could affect the outcome of the suit
 19 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party
 20 moving for summary judgment has the burden of showing the absence of a genuine issue of
 21 material fact, and the court must view all facts and draw all inferences in the light most favorable
 22 to the non-moving party. *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1148 (D. Nev. 2005). In response
 23 to a properly submitted summary judgment motion, the burden shifts to the opposing party to set
 24 forth specific facts showing that there is a genuine issue for trial. *Henderson v. City of Simi Valley*,
 25 305 F.3d 1052, 1055–56 (9th Cir. 2002). The non-moving party "may not rely on denials in the
 26

1 pleadings but must produce specific evidence, through affidavits or admissible discovery material,
2 to show that the dispute exists.” *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991).

3 III. DISCUSSION

4 The Court now considers the sole issue on appeal: whether, under 11 U.S.C. §
5 548(a)(1)(B)(i), USACM received reasonably equivalent value in exchange for its wire transfer to
6 Bingham.

7 Section 548 provides a mechanism by which bankruptcy trustees can avoid
8 fraudulent transfers. To avoid a transfer under U.S.C. § 548 (a)(1)(B), the Trust must establish that:
9 (a) USACM received less than reasonably equivalent value for the transfer; (b) USACM was
10 insolvent on the date of the transfer; (c) the transfer occurred within one year of the bankruptcy
11 filing; and (d) USACM had an interest in the property transferred. 11 U.S.C. § 548 (a)(1)(B); *In re*
12 *Trujillo*, 215 B.R. 200, 203 (9th Cir. 1997).

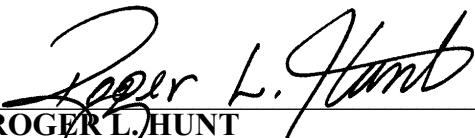
13 In determining whether a debtor received reasonably equivalent value, a court
14 undertakes a two-step process. *In re Brobeck, Phleger, & Harrison, LLP*, 408 B.R. 318, 341
15 (Bankr. N.D. Cal. 2009). First, it determines whether the debtor received any value in exchange
16 for the transaction. *Id.* Second, where value was exchanged, the court determines whether the value
17 of the transferred asset was reasonably equivalent to what the debtor received. *Id.*

18 The parties in this case agree a promise of repayment can provide reasonably
19 equivalent value. However, Bingham has not provided any evidence whatsoever of a promise to
20 pay. No party has provided any evidence to suggest that Hammond, CVE, MS Acquisitions,
21 Marlton Square Associates, or any other affiliated entity or person agreed, orally or in writing, to
22 repay this loan. Neither has Bingham shown that the \$200,000 was added to any existing USACM
23 loan amount or that any new loan documentation or agreement were created. Based on this lack of
24 evidence, the Court concludes no reasonable juror could find that USACM received reasonably
25 equivalent value for its transfer to Bingham. The Court therefore concludes the bankruptcy court
26 did not err in granting the Trust’s motion for summary judgment.

CONCLUSION

No genuine issue exists as to whether USACM received equivalent value from any party for its transfer to Bingham. Given the material and undisputed facts of this case, a reasonable juror could not conclude that USACM received reasonably equivalent value for its wire transfer of \$200,000 to Bingham. Thus, there is no genuine dispute the transfer violated 11 U.S.C. § 548. The bankruptcy court's entry of summary judgment on the issue was therefore appropriate, and its decision is AFFIRMED.

Dated: June 3, 2010.



ROGER L. HUNT
Chief United States District Judge